

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

DARRYL TUCKER,
Petitioner,

v.

Case No. 05C0003

CATHY JESS,
Respondent.

ORDER

On January 3, 2005, Darryl Tucker filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 asserting that his state court conviction and sentence were imposed in violation of the Constitution. Petitioner is currently incarcerated at Dodge County Correctional Institution. Petitioner recently filed two letters informing the court that he may be transferred to another institution. Petitioner requests that I prevent the transfer. I will construe petitioner's letters as a motion to prevent his transfer.

Petitioner argues that Fed. R. App. P. 23(a) precludes his transfer from Dodge County Correctional Institution to another institution. Fed. R. App. P. 23(a) states that "[p]ending review of a decision in a habeas corpus proceeding . . . the person having custody of the prisoner must not transfer custody to another unless a transfer is directed in accordance with this rule." However, "Rule 23(a) applies only when a habeas action is before the court of appeals on review of a district court's decision." Mitchell v. McCaughtry, 291 F. Supp. 2d 823, 835 (E.D. Wis. 2003); see also Pethtel v. Att'y Gen. of Ind., 704 F. Supp. 166, 168–69 (N.D. Ind. 1989). Thus, Rule 23(a) is inapplicable in the present case.

Moreover, petitioner provides no other basis for granting his motion and none is evident from the record.

Therefore, for the reasons stated,

IT IS ORDERED that petitioner's motion to prevent his transfer is **DENIED**.

Dated at Milwaukee, Wisconsin, this 25 day of July, 2005.

/s _____
LYNN ADELMAN
District Judge